SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1365

MAY 20

RANGER INSURANCE COMPANY,
Petitioner

v.

MIRIAM G. CULBERSON, Executrix, and
CAROL BROWN MacLEAN, Executrix,
Respondents

BRIEF OF RESPONDENT CAROL BROWN MacLEAN IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

SWIFT, CURRIE, McGHEE & HIERS
2000 Atlanta Gas Light Tower
Peachtree Center
Atlanta, Georgia 30303

—and—

STANLEY J. LEVY
ALAN J. KONIGSBERG
KREINDLER & KREINDLER
99 Park Avenue
New York, New York 10016

—and—

HUGHES, McELROY, CONNELL, FOLEY & GEISER
Gateway One
Newark, New Jersey 07102

Attorneys for Respondent Carol Brown MacLean

Counsel of Record:
STANLEY J. LEVY
99 Park Avenue
New York, New York 10016

May 22, 1972

TABLE OF CONTENTS

	PAGE
OPINIONS BELOW	1
JURISDICTION	2
QUESTION PRESENTED	2
STATEMENT OF THE CASE	2
FACTS	3
REASONS FOR DENYING THE WRIT:	
I—The Court of Appeals did not violate the rule of Erie in holding that the Culberson policy was in effect on the date of the accident	6
II—The reasonable and correct decisions of the Court of Appeals for the Fifth Circuit are based upon the law of Georgia governing insurance policies. Ranger's transparent attempt to persuade this Court to undertake a de novo factual review, contrary to the stated policy of this Court, should be denied	9
CONCLUSION	10

Cases Cited

Erie R. Co. v. Tompkins, 304 U. S. 64 (1937)	6-8
Farmers and Merchants Bank of Manchester v. Ranger Insurance Company, 125 Ga. App. 166, —— S. E. 2d —— (1971), cert. denied —— Ga. —— (1972)	6-8
Graver Mfg. Co. v. Linde, 336 U. S. 271, 275 (1949)	9

PAGE

Green v. American Tobacco Co., 304 F. 2d 70, on rehearing certification of question to Florida Supreme Court, 304 F. 2d 673, rev'd and rem'd, 325 F. 2d 673 (5th Cir. 1963), cert. den. 377 U. S. 943 (1964) 8, 9

Spiegel, Estate of v. Commissioner, 335 U. S. 701, 707-708 (1948) 10

Statute Cited

28 U.S.C. 1254(1) 2

Rule Cited

Rule 19(1)(b) 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1365

RANGER INSURANCE COMPANY,
Petitioner,

v.

MIRIAM G. CULBERSON, Executrix, and
CAROL BROWN MacLEAN, Executrix,
Respondents.

BRIEF OF RESPONDENT CAROL BROWN MacLEAN IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Opinions Below

The opinion of the Court of Appeals for the Fifth Circuit affirming the decision of the United States District Court for the Northern District of Georgia was rendered on December 28, 1971 and is reported at 454 F. 2d 857.*

* The Opinion is set forth at pages 15a-41a of the Appendix A of the Petition herein. "App." refers to the Appendix to the Petition for Certiorari.

Petitioner's motions for a rehearing in said court and a rehearing *en banc* were denied and are also reported at 454 F. 2d 857; App. A, at pp. 42a-43a. The opinion of the United States District Court for the Northern District of Georgia was not officially reported but appears at 11 Avi. L. Rptr. 18074, App. A, at pp 1a-14a.

Jurisdiction

Petitioner attempts to invoke the jurisdiction of this Court under 28 U.S.C. 1254(1).

Question Presented

Should this Court review the considered decisions of the Court of Appeals and the District Court holding that an aircraft "all-risk" policy written by petitioner was in effect at the time of a fatal crash where the courts below considered all the facts and relevant state court decisions? Stated another way, should this Court exercise its discretion and undertake a *de novo* factual review merely because petitioner alleges that the courts below did not consider one state court decision which petitioner admittedly presented to the Court of Appeals before that court rendered its original decision and again before that court denied petitioner's motion for rehearing?

Statement of the Case

Petitioner Ranger Insurance Company, the insurer, brings this Petition for Writ of Certiorari to review the judgments and opinions of the United States Court of Appeals for the Fifth Circuit. That court, after reviewing the facts of this case and the particular policy in issue, affirmed the judgment of the District Court holding

that the "all-risk" aircraft insurance policy prepared and issued by petitioner was in full force and effect and covered both the named insured student pilot, William A. Culberson, and his passenger, Bruce A. MacLean, who died in the crash of Mr. Culberson's aircraft near Oxford, New York on August 30, 1967. The court rejected the attempt by the company which had eagerly sought Mr. Culberson's business and accepted his premiums, to deny its liability under the policy.

The primary ground for review asserted by petitioner is its contention that the court below did not give due weight to a recent Georgia intermediate appellate court decision which petitioner claims is in point. However, the facts and policies in this case and the one relied on by petitioner are far from "identical." There are many grounds for distinguishing between the two cases and the Court of Appeals was amply justified in refusing to consider the case as "controlling". Secondly, there is no basis for claiming that the court below did not consider the case. On the contrary, petitioner itself twice brought the case to the court's attention, first before the original decision was rendered and then again during the motion for rehearing. Indeed, petitioner itself cites cases showing the Fifth Circuit's willingness to review a prior decision where newly decided state law is, in fact, controlling.

Facts

Ranger had issued an "all-risk" aircraft liability policy to Mr. Culberson shortly after he purchased the particular aircraft. The policy was drafted by the company, and the company selected which endorsements were to be included and what was to be typed in. Mr. Culberson, who was a student pilot, was the named insured and the com-

pany not only typed in a relevant part of the policy to "in"clude coverage for passengers, but also omitted to include certain endorsements which would have excluded coverage under the particular facts of this case. After the accident occurred which resulted in the death of the pilot and the passenger and the destruction of the plane, the company attempted to deny coverage. The company's attempt to characterize its denial of coverage as a "suspension" of coverage (Petition at p. 3) is a misleading euphuism. As the Court of Appeals correctly held:

> "Actually what Ranger asks us to do is to *invalidate* the insurance policy." 454 F. 2d 865; App. A, p. 28a (Emphasis added)

The sole basis for petitioner's disclaimer was that Mr. Culberson operated the aircraft with a passenger aboard, allegedly in violation of a Federal Aviation Regulation, the limitation of his student pilot certificate, and Item 7 of the Pilot Clause of the policy which provided:

> "Only the following pilot(s) will operate the aircraft while 'in flight' and while holding proper pilot certificate(s) with appropriate ratings as required by the Federal Aviation Agency. W. A. CULBERSON OR ANY OTHER PRIVATE OR COMMERCIAL PILOT HAVING A MINIMUM OF 200 TOTAL LOGGED HOURS, INCLUDING AT LEAST 25 HOURS IN RETRACTABLE GEAR AIRCRAFT." (The portion capitalized is typed in; the remainder is printed.)

As the Court of Appeals correctly held:

> "It is the policy not the pilot's certificate nor the FAA regulations that sets the perimeters of insurance coverage." 454 F. 2d 861; App. A, p. 2a.

The company disclaimed coverage notwithstanding the obvious fact that in purchasing an "all-risk" policy, Mr. Culberson intended to cover himself under all circumstances where he operated the insured aircraft. The clear language of the policy which was drafted by petitioner, and as reasonably understood by the insured, included liability coverage for bodily injuries sustained by his passengers. Mr. Culberson was not only the sole named insured, but was also the only person specifically named in Item 7, the Pilot Clause of the policy, to fly the plane. The Court of Appeals correctly held on the facts of this case that Mr. Culberson complied with the language of the Pilot Clause. 454 F. 2d 86-866; App. A, pp. 19a-29a. The Court held specifically in that connection:

> "Mr. Culberson held a perfectly 'proper' certificate at the time of his accident, even though his conduct was regulated by the FAA, and the certificate remained 'proper' until it was suspended or revoked by discretionary act of the FAA." 454 F. 2d 864; App. A, p. 25a.

Additionally, Ranger consciously chose to omit from the policy certain exclusions which specifically forbade coverage to student pilots, 454 F. 2d at 862; App. A, p. 21a, and to pilots who operated their aircraft in violation of regulations pertaining to pilot certificates, 454 F. 2d 863; App. A, p. 23a. Finally, petitioner specifically provided liability coverage for passenger injuries by typing into a blank space in the policy in capital letters the prefix "in" to include passenger coverage. See: 454 F. 2d 867; App. A, p. 32a.

In conclusion, the Court of Appeals correctly held that Ranger's policy covered Mr. Culberson and his passenger because:

". . . Ranger contracted for precisely the matrix of risks that came to fruition here. [citation omitted] Ranger fully intended to insure a student pilot and 'in'-cluded passenger coverage, omitting specific exclusions that might have foreclosed the entire issue." 454 F. 2d 867; App. A, pp. 32a-33a.

REASONS FOR DENYING THE WRIT

I

The Court of Appeals did not violate the rule of *Erie* in holding that the Culberson policy was in effect on the date of the accident.

Petitioner has asserted without justification that the Court of Appeals disregarded and ignored the principle established in *Erie R. Co. v. Tompkins*, 304 U. S. 64 (1937) in failing to consider or cite the case of the *Farmers and Merchants Bank of Manchester v. Ranger Insurance Company*, 125 Ga. App. 166, —— S. E. 2d —— (1971), *cert denied* —— Ga. —— (1972). Petition at p. 11. Yet, in the very next paragraph, petitioner contradicted itself, noting that the Court of Appeals in its opinion "recognized that Georgia law, under the *Erie* principle, was controlling. . . ." Petition at p. 11. Further misleading this Court, Ranger asserted that the *Farmers* case and the case at bar were based upon an identical factual situation. Petition at p. 11.

Respondent MacLean respectfully submits: (1) The Circuit Court of Appeals was apprised of and considered *Farmers* prior to rendering both of its decisions in the instant action and considered it inapplicable; (2) The facts and insurance policies in *Farmers* and the case at

bar are different; (3) The Circuit Court failed to apply *Farmers* because it was inapplicable to the case; (4) The Court of Appeals, therefore, fully conformed to the *Erie* principle.

Even petitioner concedes that it brought to the attention of the Circuit Court the opinion of the Georgia Court of Appeals in *Farmers* prior to the Court of Appeals' decisions in the case at bar, and again before the Court of Appeals considered the motion for reconsideration. Petition at pp. 10-12.

The facts in *Farmers* and in the case at bar are not at all identical. Though *Farmers* did involve a student pilot, an airplane and a Ranger Insurance policy, the similarity ends there. *Farmers* was an action to recover the value of the destroyed aircraft. The MacLean action is a wrongful death action brought on behalf of the estate of the deceased passenger based on the alleged negligence of Ranger's insured pilot.

There were other differences between the two policies, including differences in the forms used by Ranger and differences in the language of Ranger's endorsement pages. Furthermore, the language of the Pilot Clause in the *Farmers* policy was markedly different from Ranger's Pilot Clause in the Culberson policy.

As the Court of Appeals correctly held, according to Georgia law, in order to ascertain the intention of the parties from the terms of an insurance policy, each policy must be construed in light of its own language as reasonably understood by each respective insured:

> "Was it the intention of the parties from the terms of the policy, as such terms would reasonably be understood by the insured, that Culberson would be covered under the circumstances that later oc-

> curred? [Citations omitted] We must look at the policy as a totality, using the usual rules of construction of contracts." [Citations omitted] 454 F. 2d at 861; App. A, pp. 18a-19a.

The Court of Appeals then held that based upon this particular policy and facts of this case that coverage existed:

> ". . . Ranger contracted for precisely the matrix of risks that eventually came to fruition. [Citation omitted] Ranger insured a student pilot and "in"-cluded passenger coverage, omitting specific exclusions that might have foreclosed the entire issue.
>
> * * *
>
> "The clumps of words in an insurance policy might seem like so much insignificant jabberwocky to those who follow insurance law, perhaps worse to those who only stumble into the field. Jabberwocky it might be. Insignificant it is not. On those clumps of words rests the intent of the insurance coverage." 454 F. 2d at 867; App. A, pp. 32a-33a.

Not only was the language of the two policies different, but they were issued to different insureds in different factual settings.

The decision in *Farmers* reflects the factual dissimilarities between the cases and also reflects that many of the issues which were raised before and by the Court of Appeals were neither raised nor considered by the *Farmers* court.

On the basis of the aforesaid, petitioner's assertion that the Fifth Circuit failed to follow a "controlling" state court decision is patently erroneous. As Ranger conceded in its petition, at page 12, n.6 wherein it cites *Green* v.

American Tobacco Co., 304 F. 2d 70, on rehearing certification of question to Florida Supreme Court, 304 F. 2d 673, rev'd and rem'd, 325 F. 2d 673 (5th Cir. 1963), cert. den. 377 U. S. 943 (1964), the Fifth Circuit, in a proper case, is willing to reconsider its decision where a subsequent decision of a state court is relevant. The Court of Appeals' failure to cite or apply *Farmers* is based upon its factual dissimilarity to the case at bar. The Court of Appeals, therefore, did not violate the *Erie* principle in this case and, therefore, certiorari should be denied.

II

The reasonable and correct decisions of the Court of Appeals for the Fifth Circuit are based upon the law of Georgia governing insurance policies. Ranger's transparent attempt to persuade this Court to undertake a *de novo* factual review, contrary to the stated policy of this Court, should be denied.

Respondent MacLean will not burden this Court with a lengthy substantiation of the reasonableness and correctness of the judgments and opinions of the Court of Appeals which is readily apparent from the opinions themselves, except to indicate her agreement with the views stated by the Court below.

Respondent respectfully submits that Ranger's invocation of Rule 19(1)(b) of the Rules of this Court is an obvious attempt to circumvent the stated policy of this Court not to review the factual findings of the lower courts. *Graver Mfg. Co.* v. *Linde*, 336 U. S. 271, 275 (1949). This policy is based upon this Court's recognition that in deciding an issue based upon state law, the Court of Appeals for that state is generally more familiar with local state law than this Court. Where the Court of

Appeals' opinion is based upon a reasonable construction of state law, such opinion will not be disturbed. *Estate of Spiegel* v. *Commissioner*, 335 U. S. 701, 707-708 and cases cited therein (1948).

Since the correctness and reasonableness of the decision of the Court of Appeals are readily apparent from its opinions, petitioner's second reason for granting certiorari cannot stand.

CONCLUSION

For the reasons stated, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

SWIFT, CURRIE, McGHEE & HIERS
2000 Atlanta Gas Light Tower
Peachtree Center
Atlanta, Georgia 30303

—and—

STANLEY J. LEVY
ALAN J. KONIGSBERG
KREINDLER & KREINDLER
99 Park Avenue
New York, New York 10016

—and—

HUGHES, McELROY, CONNELL, FOLEY & GEISER
Gateway One
Newark, New Jersey 07102

Attorneys for Respondent
Carol Brown MacLean

Counsel of Record:

STANLEY J. LEVY
99 Park Avenue
New York, New York 10016

May 22, 1972